86-1191

Supreme Court, U.S.
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No. 86-____

IN THE

Supreme Court of the United States

BOB WARREN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. May a complaint be characterized as "frivolous" under Rule 11, Federal Rules of Civil Procedure, and the plaintiff's attorney sanctioned for filing it, where the attorney's inquiry into the law at the time of filing the action reveals that there is judicial precedent for the plaintiff's position and no controlling adverse authority?
2. Must a court of appeals, in reviewing a district court's decision that a plaintiff's attorney violated Rule 11, Federal Rules of Civil Procedure, by failing to make reasonable inquiry into the legal support for the plaintiff's position, defer to the lower court's discretion, or may it review the district court's legal conclusions de novo?

3. May a district court decide that an attorney has violated the "reasonable inquiry" requirement of Rule 11, Federal Rules of Civil Procedure, and must therefore be sanctioned, without affording him notice of the grounds and an opportunity to be heard?

4. May a court of appeals sanction an appellant's attorney under Rule 38, Federal Rules of Appellate Procedure, for prosecuting a "frivolous" appeal merely because it determines that the original action was frivolous, absent a showing of bad faith, improper purpose, or other aggravating circumstances?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Bob Warren, his client, the plaintiff Susan P. Dalton, and the respondent United States of America. Since the issues respecting Susan P. Dalton are not addressed in this petition, she is not named as a party herein.

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No. 86-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BOB WARREN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Bob Warren respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on September 17, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is as yet unreported (although it was designated as a published opinion) and is reprinted in the appendix hereto, p. 1a, infra.

The memorandum decisions of the United States District Court for the Western District of North Carolina (Jones, J.) are reported as Dalton v. United States, 56 AFTR 2d 85-6306 (W.D.N.C. 1985). They are reprinted in the appendix hereto, pp. 18a and 30a, infra.

JURISDICTION

Invoking federal jurisdiction under 26 U.S.C. §7422, petitioner Warren filed this suit on behalf of his client, Susan P. Dalton, in the Western District of North Carolina on March 22, 1985. On August 27, 1985, the district court allowed

respondent's motion for summary judgment and ordered that petitioner be sanctioned for filing the action. On December 9, 1985, the district court entered its order assessing the amount of respondent's attorney fees and costs to be recovered of petitioner as a sanction. Timely notices of appeal were entered as to each judgment.

On September 17, 1986, the Fourth Circuit entered its opinion affirming both judgments and allowing the government's motion for sanctions against petitioner for prosecuting a frivolous appeal. A timely petition for rehearing and a suggestion for rehearing in banc were filed on October 1, 1986, and were denied by the court of appeals on October 30, 1986.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

RULES INVOLVED

Federal Rules of Civil Procedure:

> Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.
>
> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by

existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Federal Rules of Appellate Procedure:

Rule 38. Damages for Delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

Petitioner is an attorney engaged in

the private practice of law in the small town of Black Mountain, North Carolina. In 1984, petitioner was asked to represent Susan P. Dalton. Ms. Dalton had filed an income tax return in which, for religious reasons, she asserted a credit for that portion of her tax that she computed would be used for military purposes. However, in an attachment to her return, she had also disclosed the correct amount of tax due (actually, the correct amount of refund due her) and had explained the nature of her objections to military spending. The Internal Revenue Service had notified her that she would be assessed a $500 penalty pursuant to 26 U.S.C. § 6702 for having filed a "frivolous" tax return. She later filed an amended return, in which she deleted the improper credit and computed the correct tax liability and refund due,

using asterisks and an accompanying letter to voice her concerns. Her claim for refund and abatement of the $500 penalty was denied and she was notified of her right to file suit within thirty days to contest the penalty.

Petitioner agreed to represent Ms. Dalton. Before filing the complaint on her behalf, he carefully researched the law and, since he was not experienced in tax matters, consulted with a tax lawyer. He learned that 26 U.S.C. § 6702, enacted in 1982, was a new and relatively untested statute. No published decision of this Court, the Fourth Circuit, or any district court in North Carolina had ever ruled upon its constitutionality or scope. Decisions were beginning to be rendered by other district courts in which such issues were raised, and the result was then a split of

authority. Federal district courts in Louisiana and California had ruled for the government. Drefchinski v. Regan, 589 F. Supp. 1516 (W.D. La. 1984); Franklet v. United States, 578 F. Supp. 1552 (N.D. Cal. 1984). However, another federal court in California had ruled for the taxpayer. Jenny v. United States, 581 F. Supp. 1309 (C.D. Cal. 1984), rev'd, 755 F.2d 1384 (9th Cir. 1985).[1] Early in 1985, three such cases[2] reached appellate courts, which

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[1]The date of the Ninth Circuit's decision in Jenny was March 18, 1985, which concededly was three days before petitioner dated his complaint on behalf of Ms. Dalton. Surely, however, Rule 11 contemplates a reasonable time for counsel to learn of recent decisions, especially yet-unpublished opinions rendered on the opposite coast.

[2]Welch v. United States, 750 F.2d 1101 (1st Cir. 1985; Kahn v. United States, 753 F.2d 1208 (3d Cir. 1985); and Wall v. United States, 756 F.2d 52 (8th Cir. 1985).

upheld the application of the penalty, although it is unknown when the decisions were published in the advance sheets,[3] and none was cited in the district court's memorandum opinion issued August 27, 1985.

In none of those cases was the taxpayer's claim treated as frivolous, nor was the losing party sanctioned under Rule 11. Jenny, petitioner felt, was particularly in point, since there the district court had held that the taxpayer-plaintiffs' return and attachments, taken as a whole, had shown the correct tax due and had therefore enabled the government to judge the

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[3]Welch was decided January 4, 1985; Kahn was initially decided January 23, 1985, was amended February 4 and 14, 1985, and was denied rehearing en banc February 19, 1985; Wall was decided February 27, 1985.

substantial correctness of their self-assessment, as the statute required, despite their assertion of a "conscience deduction." 581 F.Supp. at 1311.

Accordingly, attorney Warren invoked his client's statutory right[4] to contest her liability for the penalty by filing this action.

The government responded with motions to dismiss, for summary judgment, and for attorney's fees because of the plaintiff's "bad faith." In its memorandum of law accompanying the motions, the government contended that taxpayer Dalton's case was "precisely the same in all significant aspects" as two cases that had been recently decided by another federal

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[4]26 U.S.C. § 6703(2), "Persons must bring suit in district court to determine his liability for penalty.--"

district court in North Carolina, McKee v. United States, No. C-84-677-G (M.D.N.C.December 17, 1984), and Gibbs v. United States, No. C-84-849-D (M.D.N.C. February 26, 1985). Neither decision was published, and both were pending on appeal at the time the court imposed sanctions against petitioner.[5] Moreover, the judge who decided those cases had declined to award fees to the government, noting that their appellate resolution would guide any motion for fees in similar cases which might be brought in the future. (Gibbs, slip opinion at 5 n.4).

The government's memorandum asserted that it was entitled to sanctions against

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[5]The cases have since been decided and are reported sub nom. McKee v. United States, 781 F.2d 1043 (4th Cir. 1986), affirming the imposition of a penalty upon taxpayers who claimed a "war tax credit."

petitioner for his "bad faith," his unreasonable multiplication of the proceedings (cf. 28 U.S.C. § 1927), and his having brought the action for an "improper purpose" (cf. Rule 11). It did not argue, however, that petitioner had failed to present a "good-faith argument for the extension, modification, or reversal of existing law," as permitted by Rule 11. Yet the district court, without holding a hearing on the issue, held that petitioner would be sanctioned for having failed to make reasonable inquiry to determine that his client's case was warranted by existing law or a good-faith argument for its modification or reversal. Warren was never provided with notice that this prong of Rule 11, rather than the improper purpose clause or the more stringent provisions of § 1927, would be asserted as a basis for

sanctions.

The matter was set for further hearing on November 4, 1985, on the issue of the amount of the sanction. At the opening of that hearing, the district court informed petitioner that he would now be heard "on the question of the amount of the attorneys fees filed by the government in this case." Warren attempted to argue that he should not be subjected to sanctions at all, and he filed with the court an affidavit from the attorney who had represented McKee and Gibbs in their respective actions and on appeal, supporting the reasonableness of petitioner's representation of his client. (The affidavit is reproduced at App. 37a).

On December 9, 1985, the district court entered its judgment and memorandum of decision assessing fees against

petitioner in the sum of $613.22.[6] Warren appealed the decision to the Fourth Circuit, which, reviewing solely for abuse of discretion, affirmed without even cursory analysis of the precedent existing at the time petitioner filed his action, save the conclusionary - and erroneous - statement that his "theories" had been "uniformly rejected." Without further discussion, the court imposed additional sanctions against petitoner and his client under Rule 38 for prosecuting a frivolous

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[6]The importance of this case to petitioner goes well beyond the amount of the government's fees. As Judge Weinfeld has pointed out, imposition of sanctions against an attorney "carries with it condemnation of his professional conduct." Tedeschi v. Smith, Barney, Harris, Upham & Co., 579 F. Supp. 657, 661 (S.D.N.Y. 1984) aff'd, 757 F.2d 465 (2d Cir. 1985). The collateral consequences may even include state bar disciplinary proceedings.

appeal. A petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. THE SCOPE OF AN ATTORNEY'S DUTY UNDER RULE 11, FEDERAL RULES OF CIVIL PROCEDURE, TO MAKE REASONABLE INQUIRY INTO THE LAW PRIOR TO FILING A CIVIL ACTION, AND THE EXTENT TO WHICH HE MAY BE SANCTIONED FOR PROSECUTING A CASE FOR WHICH THERE IS PRECEDENT, PRESENT IMPORTANT QUESTIONS OF PUBLIC POLICY THAT MERIT RESOLUTION BY THIS COURT.

Even though the subject of sanctions is a distasteful one for any court, increasing tensions in and occasional abuses of the judicial system have prompted both judges and legislators to turn towards

> sanctions as a means of improving the litigation process. Unfortunately, however, we do not yet have an integrated "code" of sanctions to supply coherent guidance. Indeed the sources of judges' sanctioning power are diverse, and the standards invoked have not always been either clear or consistently applied.

Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986).

Since enactment of the 1983 amendments to Rule 11, hundreds of reported decisions, and countless unreported ones, have sought to define the scope of an attorney's certification, made after reasonable inquiry, that his pleading is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." The Federal Judicial Center has studied the application of Rule 11 in a mix of routine and fairly complex cases, and its conclusions were as follows:

> Overall, we found that although the 1983 amendments appear to have increased judges' readiness to enforce the new certification requirements, their success thus far has been limited. Of specific concern are the findings that there is a good deal of interjudge disagreement over what actions constitute a violation of the rule, only partial compliance with the desired objective standard, inaccurate and systematically biased normative assumptions about other judges' reactions to frivolous actions, and a continued neglect of alternative, nonmonetary means of response.

S.M. Kassin, An Empirical Study of Rule 11 Sanctions (1985) at xi.

As the Ninth Circuit recently said, "[t]here is another risk when mandatory sanctions ride upon close judicial decisions. The danger of arbitrariness increases and the probability of uniform enforcement declines." Golden Eagle Distributing Corp. v. Burroughs Corp., 801

F.2d 1531, 1541 (9th Cir. 1986).

This case therefore presents an important issue of public policy and provides an appropriate vehicle for its resolution. This Court has previously reviewed judicial sanctions against lawyers in Roadway Express, Inc. v. Piper, 477 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). Unlike the statute involved in that case, which prohibits attorney misconduct that unreasonably complicates and delays court proceedings, the rule invoked against petitioner, as interpreted by the court below, required that he be sanctioned simply for filing his initial pleading, as long as the district court determined that there was insufficient precedent to support it. Cases such as petitioner's do not involve bad faith or improper motive; an attorney who, in the best of faith and with

the most laudable motives, dares to plead a case of first impression in a particular court risks being professionally disciplined.

The case also presents the issue of the proper focus of a court's inquiry as to whether an attorney has made the "reasonable inquiry" mandated by the rule. In fulfilling this duty, may an attorney rely upon a published decision by a United States district judge in a similar case in determining that his case is warranted by existing law? The district court below, holding petitioner to an unusual degree of foresight, held that sanctions were proper because the sole district court decision (Jenny) had been later reversed. The court of appeals ignored Jenny altogether and incorrectly stated that the precedent against petitioner's position was

"uniform," holding that "[i]t was not reasonable to believe that the taxpayer's position was plausible." The inescapable implication is that it was not reasonable to believe that Judge Tashima's position in Jenny was plausible, either. This cannot be the standard by which an advocate's professional responsibility is measured.

There is inherent tension between the alternative requirements that a pleading be warranted by existing law or that it be warranted by a "good faith" argument for the extension, modification, or reversal of existing law. Is the proper focus upon the status of the legal precedents, which was the approach of the lower courts in this case? How must an attorney signal that he instead, or alternatively, seeks to "modify" existing law by distinguishing his case from others, or to reverse existing

law altogether? The court below confined its analysis to whether petitioner's "theories" - which included his reasoned attempt factually to distinguish Dalton's case from others - had been presented to and rejected by other courts. Under that rationale, one wonders, for example, at what point between 1896 and 1954 a challenge to de jure racial segregation would no longer have been deemed frivolous, requiring its pleader to be sanctioned.

This case also implicates the right of access to the courts. Petitioner's only offense was to plead his client's cause, yet he was judically sanctioned under a rule which expressly allows good-faith arguments for the reversal of existing law. His case is an appropriate one in which to define the parameters of permitted pleading, since it involves nothing more -

no contumacious courtoom antics, no defiance of discovery efforts or pretrial orders, no harassment of an opponent. The Court should establish a rule that will guide members of the bar in pleading cases other than those brought under well-settled doctrine, in a manner that will preserve the American legal tradition of vigorous advocacy and forceful reasoned dissent, without threat of judicial sanction.

II. THE STANDARD OF REVIEW - ABUSE OF DISCRETION OR PLENARY - TO BE EMPLOYED BY AN APPELLATE COURT REVIEWING A DISTRICT COURT'S DETERMINATON THAT AN ATTORNEY HAS VIOLATED RULE 11 BY BRINGING A CASE FOR WHICH THERE IS INSUFFICIENT SUPPORTING PRECEDENT PRESENTS AN IMPORTANT QUESTION OF POLICY, AS TO WHICH

THERE IS A CONFLICT AMONG THE CIRCUITS

THE IMPORTANCE OF THE ISSUE

Petitioner was sanctioned for filing his pleading on behalf of Dalton, whereas the attorney who prosecuted two substantially indistinguishable actions on behalf of McKee and Gibbs was not. When this uneven result was pointed out at oral argument, the court's only response was to refer to the discretion of district judges. Discretion is not, however, a synonym for whim or caprice; "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 95 S. Ct. 2362, 45 L.Ed.2d 280, 296 (1975) (quoting from the opinion of Chief

Justice Marshall in United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807)).

The dangers of deferring to a trial court's decision to sanction an attorney merely for filing a case are twofold: first, as this case illustrates, deference condones arbitrary and inconsistent results, which, aside from their inherent undesirability in a system of laws, also chill the creative and imaginative advocacy that has contributed so much to the growth of American jurisprudence. Second, there is the risk that such a delegation of discretion in determining access to the nation's trial courts will give free rein - or at least rein loosened by a hands-off standard of review - to judges who may be motivated by ideological antipathy or other reasons to sanction more readily certain attorneys, or attorneys in certain types of

cases, than others. On this latter point, it is interesting to note that according to a survey conducted by the Federal Judicial Center, the only statistically significant variable between judges who frequently imposed sanctions and those who rarely imposed them was in their reaction to civil rights claims; but contrary to what one would expect from the language of the rule, which expressly permits pleadings seeking to extend or overturn existing law, sanctions are more likely to be imposed in civil rights cases than in others. S.M. Kassin, An Empirical Study of Rule 11 Sanctions (1985) at 38-39.

> Rule 11 should not be permitted to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and

> industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer.

Eastway Construction Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985) (Kaufman, J.). One is constrained to wonder whether, for instance, an attorney would ever have dared plead a challenge to Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) under the standard established by the Fourth Circuit's decision. It is not unusual for appellate courts to reconsider their prior holdings, and in fact this Court has held that counsel have a duty to anticipate change in the law and to challenge seemingly well-entrenched precedent. Engle v. Isaac, 456 U.S. 107, 130, 102

S.Ct. 1558, 71 L.Ed.2d 783 (1982) ("Even a . . . court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.")

It is appropriate to distinguish between attorney misconduct as a basis for Rule 11 sanctions, on the one hand, and simply filing a pleading that is later determined to lack legal merit, on the other. In the former case, it is reasonable to defer to the judgment of the trial court, which is in a better position to observe the lawyer's behavior in unreasonably protracting the proceedings, misrepresenting the facts or the law, abusing discovery, or filing a complaint for an improper purpose. Deference to the trial court's determination of the appropriate remedy, such as the amount of fees awarded, is also appropriate. But

where the only issue is the legal reasonableness of the case itself, such deference by a higher court towards a lower court's opinion on the law in a novel and developing area not only turns the traditional system of appellate review on end, it is inconsistent with the mandatory language of Rule 11 itself and presents unique dangers of abuse.

THE CONFLICT AMONG THE CIRCUITS

The Second Circuit, stressing the mandatory language of the rule, has held that the standard of review is plenary rather than the deferential approach applied by the panel in this case:

> A natural concomitant of a mandatory imposition of sanctions is a broadened scope of review by the court of appeals. Where the only question on appeal becomes whether, in fact, a pleading was groundless, we are in as good a position to determine the answer

> and, thus, we need not defer to the lower court's opinion.

Eastway Construction Corp., supra, 762 F.2d at 254 n.7.

Thus the Second Circuit conflicts with the Fourth on the issue of the standard to be applied.[7] See also Norris v. Grosvenor Marketing, Ltd., 803 F.2d 1281, 1288 n.6 (2d Cir. 1986) (appellate court is not bound by district court's determination and "may make [its] own examination of the pleadings to decide whether they were, in fact, groundless"); Kamen v. American Tel. & Tel. Co., 791 F.2d 1006 (2d Cir. 1986) (extensive appellate review of status of

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[7]Further expressions of the abuse-of-discretion standard utilized by the Fourth Circuit include Larouche v. National Broadcasting Co., Inc., 780 F.2d 1134 (4th Cir. 1986), and Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir. 1984).

law at time of filing complaint; Rule 11 sanctions reversed).

The Ninth Circuit agrees with the Second. Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986) ("Because Rule 11 mandates sanctions when it is violated, the prevailing view of the courts of appeals is that whether specific conduct violated the Rule is a legal question which must be reviewed de novo."). The Fifth Circuit, however, agrees with the Fourth. Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 787-88 (5th Cir. 1986) ("In reviewing the imposition of sanctions by the District Court pursuant to Rule 11 . . ., the standard of review is limited to whether the district court abused its discretion.")

The Fifth Circuit also conflicts with

the Second on the issue of whether the attorney's signing of a pleading amounts to a continuing warranty of legal merit, or is only a certification of the state of the law at the time it is made. Compare Southern Leasing Parners, supra ("When a lawyer learns that an asserted position, even if originally supported by adequate inquiry, is no longer justifiable he must not persist in its prosecution") with Oliveri v. Thomson, 803 F.2d 1265, 1274-75 (2d Cir. 1986):

> Rule 11 applies only to the initial signing of a "pleading, motion, or other paper." Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule.
>
> . . .
>
> Moreover, the advisory committee note to the amended rule states that the signer's conduct is to be judged as of

> the time the pleading or other paper is signed. Fed.R.Civ.P. 11 advisory committee note. It is difficult to imagine why this comment would be made if the rule were meant to impose a continuing obligation on the attorney.

The issue is of critical importance in petitioner's case. Since there was clearly judicial support (Jenny) for Dalton's position at the time petitioner conducted his inquiry into the law, but that support had been reversed by the time the case came on for hearing, it is apparent that the only grounds upon which the Fourth Circuit could have sustained the district court's sanctioning of petitioner is because it considered the rule to establish a continuing obligation. This Court should grant certiorari to clarify both the scope of the certification requirement and the appellate standard of review.

CONCLUSION

For the reasons set forth herein, petitioner respectfully requests the Court to issue its writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the judgment of that court in petitioner's case.

This the 16th day of January, 1987.

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Attorney for Petitioner

*Representation of the petitioner in this proceeding is provided by the North Carolina Civil Liberties Union Legal Foundation, Inc., a state affiliate of the American Civil Liberties Union.

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2225

SUSAN P. DALTON,
and
BOB WARREN, Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones. Senior District Judge. (C.A 85-156)

ARGUED JULY 16, 1986
DECIDED September 17, 1986

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Bob Warren and C. Frank Goldsmith, Jr., for Appellants. James H. Love (Roger M. Olsen and Glenn L. Archer, Jr., Assistant

Attorneys General; Michael L. Paup, Chief Appellate Section, Tax Division; Gary R. Allen, Tax Division on brief) for Appellees.

BUTZNER, Senior Circuit Judge:

Susan P. Dalton appeals from a summary judgment entered for the United States denying her a refund of a $500 penalty imposed pursuant to 26 U.S.C. § 6702(a) (1982) for filing a frivolous income tax return in which she claimed a credit for federal military expenditures to which she objected. Bob Warren, the taxpayer's attorney, appeals a judgment imposing sanctions on him of $613.22 pursuant to Fed. R. Civ. P. 11 to reimburse the government for its expense in defending the taxpayer's action. The government questions the jurisdiction of the district

court. We hold that the district court had jurisdiction and affirm both judgments.

I

The government asserts that the district court lacked subject matter jurisdiction because the taxpayer did not comply with 26 U.S.C. § 6703(c)(2) (1982) by bringing this action within 30 days after her claim for refund of the penalty was denied. The taxpayer contends that

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The district court's opinion is reported as Dalton v. United States, 56 AFTR 2d 85-6306 (W.D.N.C. 1985).

26 U.S.C. § 6703(c)(1) and (2) provides:

> Extension of period of collection where person pays 15 percent of penalty.--
>
> (1) In general.--If, within 30 days after the day on which notice and demand of any penalty under section 6700, 6701, or

(Footnote continued on following page)

the 30-day provision of section 6703(c)(2) pertains only to collection of the penalty and that in any event the Internal Revenue Service extended the time for bringing suit.

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2 continued

> 6702 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). . . .
>
> (2) Person must bring suit in district court to determine his liability for penalty.- If, within 30 days after the day on which is claim for refund of any partial payment of any penalty under section 6700, 6701, or

(Footnote continued on following page)

The record discloses that the chief of the examination branch of the Memphis Service Center wrote the taxpayer on January 22, 1985, that her claim for a refund of the penalty had been denied and that she could bring suit to recover it within 30 days from the date of the letter.

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2 continued

> 6702 is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the person fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

Telephone conversations and correspondence between the taxpayer's attorney and officials at the Center culminated in a letter dated March 11, 1985, from the manager of the examination unit granting an extension "to reply to the frivolous assessment" to March 22, 1985. On March 22, the taxpayer filed this action.

The district court held that failure to file an action within 30 days from the denial of the refund did not deprive the court of jurisdiction. It construed section 6703(c)(1) and (2) to provide only that the government could collect the penalty if suit were not brought within 30 days. Accord Beard v. Internal Revenue Service, 624 F. Supp. 646, 647 (E.D. Tenn. 1985).

We cannot concur in the district

court's construction of section 6703(1) and (2). In our view the 30-day requirement for bringing suit is a limitation on the right to seek judicial review of the penalty. It does not pertain merely to the government's right to collect the penalty.

In Flora v. United States,, 357 U.S. 63 (1958),. aff'd on rehearing, 362 U.S. 145 (1960), the Court held that full payment of a tax assessment is a jurisdictional prerequisite to a suit for a refund in the district court. Congress, however, relaxed the full payment requirement by enacting section 6703(c)(1), which permits a taxpayer to contest a penalty imposed by section 6702 by bringing a refund suit after paying only 15% of the penalty. By analogy to Flora, payment of the 15% is jurisdictional. See Thomas v. United States, 755 F.2d 728 (9th Cir.

1985).

Section 6703(c)(2) provides that if the taxpayer fails to comply with the 30-day requirement "paragraph (1) shall cease to apply . . . ." Under these circumstances the taxpayer cannot proceed by paying merely 15% of the penalty. The taxpayer must pay the full amount to satisfy the jurisdictional prerequisite recognized in Flora. Consequently, we conclude that the 30-day requirement of § 6703(c)(2) is a limitation on the taxpayer's right to seek judicial review by paying only 15% of the penalty.

We agree with the district court that the 30-day requirement in section 6703(c)(2) is not jurisdictional. Again, we turn to the law pertaining to refund suits in general to ascertain the intent of Congress with respect to the 30-day

requirement for refund suits brought pursuant to 6703(c)(2). Statutes pertaining to refund suits in general provide that six months after paying an allegedly erroneous assessment in full and filing an administrative claim, a taxpayer may bring a suit in the district court for a refund. See 26 U.S.C. §§ 6511, 7422, and 6532 and 28 U.S.C. § 1346(a)(1). The taxpayer's action must be filed within two years from the date the Service mails a notice of disallowance unless the notice is waived or the time extended. See 26 U.S.C. § 6532(a). This two-year requirement is a period of limitation.

Because § 6532(a) is a statute of limitations, the government may be precluded from relying on it in extraordinary circumstances. In Miller v. United States, 500 F.2d 1007 (2d Cir.

1974), the court allowed a taxpayer to proceed with his refund suit when the Commissioner inadvertently sent a notice that led the taxpayer to believe the two-year deadline had been extended. Similarly, the Court of Claims allowed a refund suit to proceed when the taxpayer, acting reasonably, was "understandably confused" by a second notice of disallowance that inadvertently extended the period of limitations. Southeast Bank of Orlando v. United States, 676 F.2d 660 (Ct. of Cl. 1982).

The construction placed on § 6532(a) as a statute of limitations and the principles explained in Miller and Southeast Bank afford sound precedent for allowing the taxpayer to maintain her action. In all three cases the government explicitly extended the time to a date

certain in which the taxpayer could act.

We caution that the 30-day limitation in section 6703(c)(2), like the 2-year limitation in § 6532 a) cannot be lightly breached. The taxpayer's inadvertence, neglect, or application for reconsideration of an administrative disallowance will not toll the statute. Moreover, the Service's reconsideration and affirmance of a disallowance will not suffice to extend the time. Compare § 6532(a)(4).

We hold that when an official of the Service explicitly extends the time to a date certain in which the taxpayer can act, the taxpayer's suit is not barred for lack of subject matter jurisdiction. Although our reasoning differs in part from that of the district court, we conclude that it did not err by denying the government's motion to dismiss.

II

Section 6702(a) of Title 25 U.S.C. imposes a penalty on a person who filed a tax return that facially indicates that the self-assessment is substantially incorrect due to a position that is frivolous. Congress envisioned "a 'war tax' deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual's estimate of the amount of his taxes going to the Defense Department budget" as frivolous within the meaning of section 6702(a). See S. Rep. No. 494, 97. Cong., 2d Sess. 278, reprinted in 1982 U.S. Code Cong. & Admin. News 781, 1024.

The taxpayer filed a return in which she claimed a credit for a portion of her tax that she computed would be spent for the military. After receiving notice of

the assessment of a penalty for filing a frivolous return, she filed an amended return reflecting the proper tax. The district court found that her advocacy of peace and her opposition to military expenditures are sincere. Nevertheless, for reasons adequately explained by the district court, we conclude that the Internal Revenue Service properly imposed the penalty specified in section 6702(a). We recently upheld the imposition of a penalty under substantially similar circumstances in McKee v. United States, 781 F.2d 1043 (4th Cir. 1986). The principles explained in McKee, govern the taxpayer's case and fully sustain the judgment of the district court.

III

We also conclude that the district court properly exercised its discretion in

imposing sanctions on the taxpayer's attorney. Sanctions are authorized by Fed. R. Civ. P. 11, which was amended in 1983 to emphasize the responsibilities of an attorney and to reinforce "those obligations by the imposition of sanctions." See Fed. R. Civ. P. 11 advisory committee note. Rule 11 provides in part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If this provision of the rule is violated,

the court "shall impose . . . an appropriate sanction." The drafters explain that the standard for determining whether an attorney has discharged the affirmative duty imposed by the rule is "one of reasonableness under the circumstances." It is a standard more stringent than good faith. See advisory committee note; Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177, 181 (7th Cir. 1985); Eastway Construction Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985).

Section 6702(a) clearly established that the taxpayer's return warranted a penalty. Any doubt an attorney harbored about the nature of her war tax credit could be quickly dispelled by reading the legislative history. Moreover, as the district court pointed out, imposition of

the penalty had been sustained in a number of cases.

The advisory committee note admonishes:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.

This cautionary note affords no shield to the taxpayer's attorney. The theories he advanced were not creative. They had been uniformly rejected. It was not reasonable to believe that the taxpayer's position was plausible.

IV

For reasons stated in Part III we grant the government's motion for sanctions against the taxpayer and her attorney for

prosecuting this frivolous appeal of the judgment denying a refund of the penalty imposed by section 6702(a). See Fed. R. App. P. 38. The government does not seek sanctions on account of the appeal brought by the taxpayer's attorney to reverse the judgment imposing Rule 11 sanctions. Consequently, the government's expenses must be prorated.

We remand the case to the district court for determination of the amount to be awarded as sanctions. The government shall recover its costs as taxed by the clerk of this court. The judgments of the district court are affirmed.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

A-C-85-156

SUSAN P. DALTON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OF DECISION

Plaintiff brought this action pursuant to 26 U.S.C.A. §7422 seeking abatement of a frivolous income tax return penalty assessed by the Internal Revenue Service and refund of $322.00, the amount of refund to which Plaintiff would ordinarily be entitled, but which has been applied by the

Internal Revenue Service towards payment of the penalty. The matter is presently before the Court upon Plaintiff's and Defendant's cross motions for summary judgment and the Government's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that this action is barred by the statute of limitations and that the Court lacks jurisdiction over the subject matter. The Court heard these motions in Asheville, North Carolina on July 1, 1985. After careful consideration of the file, briefs and arguments of counsel the Court now enters its findings and conclusions.

On April 6, 1984 Plaintiff signed and mailed her 1983 Individual Income Tax Return (Form 1040A) to the Internal Revenue Service Center in Memphis, Tennessee. Her taxable income for the year as stated on

her return was $12,198.00 and the tax owed on that amount was $1,518.00. On line 21a of the return, "Partial credit for political contributions," Plaintiff claimed a tax credit of $834.90 thereby reducing her total tax liability by a corresponding amount. To the side of her claimed credit of $834.90 Plaintiff wrote, "This is 55% of my tax money budgeted to military expenditures to which I conscientiously object." Plaintiff's total federal income tax withheld for the year was $1,840.00. She wrote on line 26 of the form that she was entitled to a refund of $1,156.90. That amount includes the $322.00 refund due to Plaintiff on account of excess withholdings plus the $834.90 tax credit she claimed. Plaintiff attached to her tax return a letter further explaining her objections to military spending as well as

the method she employed in arriving at her total tax liability and the amount of refund due.

On August 20, 1984 the Internal Revenue Service notified Plaintiff that it has assessed a $500.00 frivolous income tax return penalty against her pursuant to Section 6702 of the Internal Revenue code. 26 U.S.C.A. §6702. Plaintiff was also notified of her right to pay 15 per cent of the penalty and file a claim for refund.

On or about September 19, 1984 Plaintiff filed a claim for refund and abatement of the $500.00 penalty. Because Plaintiff had never received the $322.00 refund to which she was ordinarily entitled she authorized the Internal Revenue Service to deduct $75.00 from that amount to fulfill the 15 per cent partial payment requirement of 26 U.S.C.A. §6703. In

addition to her claim for refund of the tax penalty Plaintiff filed an amended income tax return, Form 1040X, in which she deleted the tax credit and computed the correct tax liability and refund due.

Subsequently, on January 22, 1985 Plaintiff was notified by the Internal Revenue Service that her claim for refund and abatement of the frivolous return penalty had been fully disallowed.

On March 11, 1985 Plaintiff's attorney was notified by letter from Louise Barbie, an Internal Revenue Service employee, that he had been granted an extension to reply to the frivolous assessment until March 22, 1985. Plaintiff filed her complaint in this action on March 22, 1985.

The United States argues that where Plaintiff has failed to commence her action within 30 days after the date on which her

claim for refund was denied this Court lacks jurisdiction over the subject matter of this action. It is well established that as a general rule a taxpayer must pay the full assessment prior to commencing a civil action in district court for the recovery of taxes alleged to have been erroneously or illegally assessed or collected. Lewis v. Sandler, 498 F.2d 395, 399-400 (4th Cir. 1974); citing, Flora v. United States, 357 U.S. 63, 78 S.Ct 1079, 2 L.Ed.2d 1165 (1958), aff'd on rehearing, 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d 623, rehearing denied, 362 U.S. 972, 80 S.Ct. 953, 4 L.Ed.2d 902 (1960). In the case of the frivolous income tax return penalty however the Congress saw fit to carve out an exception to this general rule. In 26 U.S.C.S. §6703 Congress expressly provided that the taxpayer could, within 30 days

after the notice and demand for the frivolous penalty was made pay an amount not less than 15 per cent of the penalty and file a claim for refund of any amount so paid. If the taxpayer chooses to follow such procedure no levy or proceeding in court for collection of the remainder shall be made, begun or prosecuted until final resolution of a district court proceeding to determine the taxpayer's liability for the penalty. 26 U.S.C.A. §6703(c)(1). If, however, the taxpayer fails to begin a proceeding in the United States district court within 30 days after the day on which his claim for refund of partial payment of the penalty is denied by the Secretary, the Secretary may levy or begin a court proceeding for the remainder of the penalty due. 26 U.S.C.A. §6703(c)(2). The effect of 26 U.S.C.A. § 6703 therefore is to allow

the taxpayer to pay at least 15 per cent of the frivolous income tax return penalty, file a claim for refund with the Internal Revenue Service and commence a district court action if the claim for refund is denied. Failure to commence a civil action in the district court within 30 days after denial of the claim for refund is not fatal to the district court's jurisdiction, but merely allows the Secretary to levy or begin an action to collect the remainder of the penalty due. The Court therefore concludes that it has jurisdiction over the subject matter of this action and that the motion of the United States to dismiss for lack of jurisdiction must be denied.

Turning next to the merits of Plaintiff's claim, the Court concludes that the Plaintiff's 1983 income tax return was frivolous as a matter of law and that the

penalty imposed against the Plaintiff by the Secretary pursuant to 26 U.S.C.A. §6702 was therefore proper.

The Plaintiff filed a purported tax return for calendar year 1983 which "contain[ed] information that on its face indicate[d] that the self-assessment [was] substantially incorrect; and" such conduct was due to "a position which was frivolous." 26 U.S.C.A. §§6702(a)(1)(B) and 6702(a)(2)(A). All the preconditions necessary for imposition of the frivolous income tax return penalty have therefore been established. The fact that Plaintiff subsequently filed an amended tax return showing the correct tax liability in no way alters or limits the Secretary's right to impose the penalty. If that were the case then taxpayers could easily thwart the congressional purpose underlying enactment

of 26 U.S.C.A §6702 simply by filing an amended tax return upon notification that the Secretary had imposed the penalty.

The issues raised by Plaintiff's complaint have been presented to so many courts and consistently ruled upon adversely to the Plaintiff's position that her insistence in bringing this action only demonstrates her stubbornness in refusing to budge from her frivolous position. United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), Lull v. Commissioner, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980), Drefchinski v. Regan, 589 F.Supp. 1516 (W.D.La. 1984), Franklet v. United States, 578 F.Supp. 1552 (N.D.Cal. 1984), Gibbs v. United States, No. C-84-849-D (M.D.N.C., February 26, 1985) (Unpublished), McKee v. United States, No. C-84-677-G (M.D.N.C.,

December 17, 1984) (Unpublished). Plaintiff's beliefs are no doubt sincerely held. However Congress has determined that line 21a of the income tax return is not the proper time nor place to express those beliefs. The statute has repeatedly withstood constitutional attack. Notwithstanding that her claim is clearly without merit, Plaintiff has opted to put the United States to the burden and substantial expense of defending this action. Rule 11 of the Federal Rules of Civil Procedure now authorizes sanctions against an attorney and/or a represented party who signs a pleading which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. The Court concludes that the pleading signed by Plaintiff's attorney in

this case violates this rule and will accordingly allow the United States its reasonable expenses incurred in defending this action upon submission of affidavits detailing its expenses. Such expenses shall be taxed against the Plaintiff's attorney.

Based upon the foregoing findings and conclusions the Court holds that the Defendant's motion to dismiss for lack of subject matter jurisdiction should be denied, that the Plaintiff's motion for summary judgment should be denied and that the Defendant's motion for summary judgment should be allowed.

A judgment in accordance with these findings and conclusions shall be entered simultaneously herewith.

This the 27th day of August, 1985.

WOODROW A. JONES
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

A-C-85-156

SUSAN P. DALTON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OF DECISION

THIS MATTER was heard before the Court on July 1, 1985 upon Plaintiff's and Defendant's cross motions for summary judgment. On August 28, 1985 the Court entered its Memorandum of Decision and Judgment granting the Defendant's motion for summary judgment. In addition the Court found that Plaintiff's attorney had signed a pleading which was not well

grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The Court therefore concluded that the government was entitled to recover its reasonable expenses incurred in defending this action. Fed.R.Civ.P. 11. The government was requested to submit affidavits detailing the expenses it incurred in defending this action. The government has now complied with the Court's request and the matter was heard before the Court on November 4, 1985 for the purpose of determining the reasonableness of the government's statement of expenses.

Plaintiff's lawyer, Mr. Bob Warren, does not dispute that the amount of expenses claimed by the government is correct and reasonable. He does, however,

contend that the Court was mistaken in its decision to award expenses, including attorney's fees, to the government.

Warren argues that he filed this action, not in bad faith, vexatiously, wantonly or for any other improper purpose, but because of his good faith belief in the merits of Plaintiff's claim. In order to accept the argument that Warren acted in good faith the Court would have to find that he was either totally oblivious to existing law or that he hoped against overwhelming odds that this Court would ignore firmly established precedent and declare unconstitutional 26 U.S.C.A. §6702. The Court is not persuaded by Warren's argument that the precise issue presented by Plaintiff's complaint has never been ruled upon by the Court of Appeals for the Fourth Circuit. There are an incalculable

number of issues which have never been squarely addressed by any Court of Appeals, but which are nonetheless frivolous. In any event, Rule 11 of the Federal Rules of Civil Procedure requires that a pleading, motion or other paper filed by a party or his attorney be supported by an objective view of the facts and the law to some extent. Thus Warren's purported lack of subjective bad faith is not sufficient, in and of itself, to shield him from the sanctions mandated by Rule 11.

Rule 11 now imposes an affirmative duty on an attorney to investigate both the facts and the law prior to filing a pleading or other paper. Assuming that Warren conducted such an investigation, he ignored Rule 11's admonition that the pleading be warranted by existing law or a good faith argument for extension,

modification or reversal of existing law. The 1983 amendment to Rule 11 was intended to reduce the reluctance of courts to impose sanctions against a party or her attorney in a case where imposition of sanctions is warranted. See, Fed.R.Civ.P. 11 advisory committee note (1983). Because of the flagrant abuse of the judicial process practiced by the Plaintiff and her attorney in this case, the Court is convinced that Rule 11 sanctions are particularly appropriate. The Court therefore concludes that it was correct in assessing expenses against the Plaintiff's attorney.

The Court now considers the amount of expenses to be awarded to the government. Robert G. Coberly, Director of the Comptroller Staff of the Tax Division, United States Department of Justice has

submitted a declaration of costs as follows:

Salary for government's attorney	$	353.22
Travel cost		260.00
Overhead cost		510.30
Total	$	1,123.52

The Court finds and concludes that the salary for the government's attorney and her travel cost are reasonable and proper expenses and that the government is entitled to recover those expenses from the Plaintiff's attorney. However, the Court is not inclined to award the government any sum for its claimed overhead cost. Much of this overhead expenses is fixed and has not been increased on account of the filing of this action. An award allowing the government to recover its attorney's salary and travel expenses should be sufficient to

accomplish the purpose of discouraging frivolous tax refund actions and the Court will accordingly enter judgment for the government in the amount of $613.22.

This the 9th day of December, 1985.

WOODROW W. JONES
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

A-C-85-156

SUSAN P. DALTON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT OF NORMAN B. SMITH

Norman B. Smith, being first duly sworn, deposes and says:

1. My name is Norman B. Smith, and I am a resident of Greensboro, Guilford County, North Carolina.

2. I was admitted to practice before the courts of the state of North Carolina

in 1965, and since that time have been continuously engaged in the private practice of law in this state. I am admitted to practice before the Supreme Court of the United States, the United States Courts of Appeals for the Fourth, Fifth, Seventh, and District of Columbia Circuits, Unites States District Courts for the Middle, Western, and Eastern Districts of North Carolina, United States Court of Claims, and the Tax Court of the United States. I have briefed and argued five cases in the Supreme Court of the United States, have briefed and argued numerous cases in the United States Courts of Appeals, and have tried a number of cases in the United States District Courts. I have practiced extensively in the field of constitutional law for 20 years. I have written law review articles dealing with

constitutional law subjects. For the past 18 years I have been general counsel of the North Carolina Civil Liberties Union and its Legal Foundation; in that capacity I have assisted the board and its legal committee with evaluating hundreds, if not thousands, of requests for legal assistance in constitutional cases, have provided general supervision over a legal program in which hundreds of constitutional cases have been litigated, and have participated in seminars and otherwise kept abreast of constitutional litigation. I have made it a practice to read every decision of the Supreme Court of the United States dealing with constitutional matters over the last 25 years, and I keep abreast of decisions rendered by the United States Court of Appeals for the Fourth Circuit and the United States District Courts in North

Carolina by reading summaries of them.

3. Through the North Carolina Civil Liberties Union Legal Foundation, Inc., I served as counsel for the plaintiffs in the cases of Deborah Gibbs v. United States, and Elizabeth S. McKee v. United States. These cases were instituted in United States District Court for the Middle District of North Carolina. Adverse judgments were rendered against plaintiffs. Appeals were taken to the United States Court of Appeals for the Fourth Circuit. They are presently pending in that court as cases nos. 85-1015 and 85-1214, respectively, where they were consolidated for argument. I argued these cases on behalf of plaintiffs-appellants before the United States Court of Appeals for the Fourth Circuit on June 5, 1985. The members of the panel hearing the appeal

listened attentatively to both sides of the argument, asked a number of questions, and did not state from the bench how they would rule. I have not yet received word of the court's decision of these cases.

4. Attached are copies of appellants' briefs filed in the Gibbs and McKee cases. At the time of briefing and oral argument, and at the present time, it is been my considered professional opinion that reasonable arguments of statutory construction were advanced by the appellants, and that their positions under the First Amendment, particularly with respect to the right to petition, are sound and ought to be sustained. Should the Court of Appeals decide adversely to the appellants, it is my intention to petition the Supreme Court of the United States for certiorari.

5. The District Court in each of the cases found that the plaintiff acted with "sincerity" or likely acted "with good intentions." No question was raised by the Government or by the court as to my good faith in preceding as counsel for them. The Government sought attorney's fees against plaintiff in the Gibbs case, but the court denied its motion for the reason that it could not find plaintiff's challenge to the statute to be made in bad faith.

6. Before filing suit on behalf of Gibbs and McKee, I was aware of the decision of the United States of Appeals for the Fourth Circuit in Lull v. Commissioner, 602 F.2d 1166 (4th Cir. 1979). In fact, the Reverend Lull had requested the North Carolina Civil Liberties Union Legal Foundation, Inc., to

assist him with that case; I had evaluated the request; and the organization had declined to provide him with legal assistance. In my opinion, the Lull case is not controlling of the outcome of the Gibbs and McKee cases, since these cases raise the issue of whether or not one can make statements of protest on an income tax return without being penalized, whereas the taxpayer in the Lull case was attempting to recover all taxes he had paid that were being expended for military purposes. Indeed, my reading of the Government's brief on appeal in the McKee and Gibbs cases is that the Government does not argue that Lull is determinative authority, only that Lull establishes that war tax refund claims are without merit. (Government's Brief, pp. 21, 29).

7. It is my considered opinion that

counsel for plaintiff is proceeding properly, rightfully, in good faith, and consistent with the North Carolina Code of Professional Responsibility, in maintaining the present action. In stating that opinion, I rely on my own experience with federal constitutional litigation, my knowledge of the issues before the court based on my involvement in the McKee and Gibbs cases, and my understanding of the North Carolina Code of Professional Responsibility Disciplinary Rule 7-102(A)(2), to the effect that an attorney may advance a claim or defense that is unwarranted under existing law, if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

NORMAN B. SMITH
Affiant

(Dated November 1, 1985, and filed November 4, 1985; notarial acknowledgment omitted in printing).